STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2015
v	No. 320361 Livingston Circuit Court
JOSHUA MICHAEL KOONCE, Defendant-Appellant.	LC No. 13-021168-FH

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Defendant, Joshua Michael Koonce, appeals as of right his conviction, following a bench trial, of second-degree home invasion, MCL 750.110a(3). The trial court sentenced Koonce as a fourth-offense habitual offender, MCL 769.12, to serve a term of 15 to 40 years' imprisonment. We affirm.

I. FACTS AND PROCEDURAL HISTORY

During the course of two police interviews, Koonce admitted to participating in a variety of home invasions throughout Michigan, including the burglary of a farmhouse. Koonce admitted that he and Jerry Wallace drove to the home, kicked in the backdoor, and took numerous items, including a television, computer, safe, and precious metals.

On December 9, 2013, Koonce moved to suppress the statements that he made to police during the interviews. Koonce contended that he was not informed of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and that his statements were involuntary. The trial court held a hearing to determine the voluntariness of Koonce's confession pursuant to *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

At the *Walker* hearing, Special Agent Steve Bailey testified that he learned that Koonce was involved in the burglaries after interviewing Wallace. According to Bailey, he read Koonce his *Miranda* warnings from "a standard *Miranda* card" within the first few minutes of the interview. Koonce indicated that he understood his rights. Koonce did not request an attorney during the proceedings, and Bailey and Koonce "talked about his attorney . . . but that was related to another matter" and "in no way did [Koonce] say this is my attorney. He represents me. I want you to call him. I don't wanna talk to you." Bailey did not realize that he could

record in the interrogation room until a short time later, and he read Koonce his *Miranda* warnings a second time for the recording.

Koonce testified that after Bailey read him his *Miranda* warnings, he said "I would like my lawyer, his name is John Secrest, to speak with you." Koonce testified that he made his statement right after initially receiving his *Miranda* warnings. Koonce also testified that Bailey promised that if Koonce cooperated, he would not receive "as much time[.]"

Livingston County Sheriff's Department Detective Marc King testified that he followed up with a second interview with Koonce that lasted about 45 minutes. According to King, he read Koonce his *Miranda* warnings using a statement of rights sheet, and Koonce indicated he understood those rights, signed the sheet, and agreed to speak with King. Koonce proceeded to describe the farmhouse burglary. King denied that he made any promises to Koonce beyond indicating that Koonce's cooperation would look positive.

The trial court reviewed the interview recordings. After considering a variety of factors, the trial court found that Koonce's statements were voluntary, and the officers did not violate *Miranda* when obtaining his statements. The trial court concluded that Koonce voluntarily waived his rights.

II. STANDARD OF REVIEW

We review de novo whether a defendant has waived his Sixth Amendment right to be represented by counsel, but review for clear error the trial court's factual findings regarding a knowing and intelligent waiver. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). We use the same standard when reviewing the trial court's determination that a defendant's *Miranda* wavier was voluntary. *Id*. The trial court's findings are clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

III. PRESENCE OF COUNSEL

Koonce contends that his confession was inadmissible because the police continued to question him after he requested counsel's presence in the interrogation room. We disagree.

The United States and Michigan constitutions guarantee a criminal defendant the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. A suspect's confession is inadmissible if police violated the suspect's right to have counsel present at his or her interrogation to obtain the confession. *People v Tanner*, 496 Mich 199, 208; 853 NW2d 653 (2014). "[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis v US*, 512 US 452, 461; 114 S Ct 2350; 129 L Ed 2d 362 (1994).

To invoke the right to counsel, an accused must make "a statement that can reasonably be construed to be an expression of a desire for assistance of counsel." *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001). Ambiguous or equivocal references to an attorney do not require police officers to cease questioning the accused. *Id*. at 237-238. Once a suspect has

invoked his or her right to counsel, police may not question the suspect without counsel present unless the defendant initiates further communications:

> [H]aving expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [*Tanner*, 496 Mich at 208-209 (quotation marks and citations omitted, alterations in original).]

In this case, the trial court found that the officers advised Koonce of his constitutional rights and Koonce voluntarily waived his rights after *Miranda* warnings. There was conflicting testimony regarding whether Koonce requested counsel—Koonce testified that he did request counsel, and Bailey testified that Koonce did not. Koonce subsequently waived his rights without any request for counsel or any indication that he had previously requested counsel. While the trial court did not expressly find that Koonce had not requested an attorney, this finding is implied from its finding that Koonce waived his rights and its decision to admit Koonce's statements.

We are not definitely and firmly convinced that the trial court made a mistake when it found that Koonce waived his right to the presence of counsel. The trial court also did not err by admitting Koonce's confession when the prosecution established that Koonce waived his rights after *Miranda* warnings, when Koonce and Bailey's testimony conflicted, and when Koonce's subsequent actions were more consistent with Bailey's testimony.

IV. VOLUNTARINESS OF CONFESSION

Koonce also contends that the trial court erred when it failed to suppress his statements because the statements were not voluntary. We disagree.

The prosecution must prove by a preponderance of the evidence that a defendant voluntarily, knowingly, and intelligently waived his or her right against self-incrimination. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). The prosecution must prove that the accused knew that he did not have to speak, that he had the right to have an attorney present, and that whatever he said could be used against him. *Id*. at 636-637.

Police compliance with *Miranda* is not dispositive of whether a defendant's waiver was actually voluntary. *People v Ray*, 431 Mich 260, 272; 430 NW2d 626 (1988). A waiver is voluntary if "the relinquishment of the right . . . was the product of a free and deliberate choice rather than intimidation, coercion, or deception . . . ." *Daoud*, 462 Mich at 635 (quotation marks and citations omitted). A defendant's waiver is not valid if the waiver itself was coerced. *Colorado v Spring*, 479 US 564, 573; 107 S Ct 851; 93 L Ed 2d 954 (1987); *People v Gipson*, 287 Mich App 261, 264-265; 787 NW2d 126 (2010). A waiver is coerced if the defendant's "will [was] overborne and his capacity for self determination critically impaired because of police conduct." *Spring*, 479 US at 574 (quotation marks and citation omitted).

To determine whether a waiver was coerced, the trial court should consider

> the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. [*Gipson*, 287 Mich App at 265.]

"[W]hether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *Daoud*, 462 Mich at 636. The suspect does not need to understand the consequences of choosing to waive rights that the police have properly explained. *Id*.

We conclude that the trial court did not clearly err when it found that Koonce's statements were voluntary. We have reviewed the record and the instances in which Koonce alleges the police made him promises. There was much discussion about the process of becoming a police informant, or how the trial court may decide to take cooperation into account, but these statements are not fairly characterized as promises. Bailey told Koonce that he would speak to Koonce's parole officer and inform him that Koonce was cooperating. Bailey did so; this phone call took place inside the interview room and was recorded. Bailey also promised to "document all [Koonce's] cooperation," which Bailey did.

Further, Bailey did not promise Koonce lenience. When Koonce asked whether it was possible that he would go back to prison, Bailey explained that "that's up to the judge." The record also includes instances in which the police specifically indicated that they could not make promises of leniency to Koonce, including the following exchange between Koonce and King:

> *Q*. . . . Listen to me. What happens at the end of the day, we can't promise you . . .
>
> *A*. Promise me.
>
> *Q*. —anything. We can't. We'd be lying to you, and we would get in trouble. At the end of the day, we're gonna do what we told you we could. But that's what we're gonna do. So, the judge makes that ultimate decision. . . .

The trial court considered Koonce's age, education, experience, intelligence, mental and physical state, and promises of leniency, and found that these factors weighed in favor of a voluntary confession. After our review of the record, we are not definitely and firmly convinced that the trial court made a mistake when it found that Koonce's confessions were voluntary. To the contrary, from our review of the transcripts as a whole, it appears that Koonce made a deliberate choice to cooperate with police.

We affirm.

/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood
/s/ Michael F. Gadola